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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1901

No. 368

FELIX M. HANLY, JEREMIAH G. WALLACE AND HENRY W. WELLS, COMMISSIONERS AND MEMBERS OF THE RAILROAD COMMISSION OF ARKANSAS, APPELLANTS,

v.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, APPELLEES.

ABSTRACT

On March 11, 1899, the Arkansas legislature passed an act providing for the regulation of freight and passenger traffic and the appointment of a railroad commission whose duties should be among other things to fix the rates of charges for freight and passenger traffic in Arkansas. This act also provided a penalty of not less than $500.00 and not more than

$3,000.00 for a violation of the rates fixed by the Commission, to be recovered in an action by the State's attorney.

In pursuance of the authority vested in them under said Act, the Commission fixed and published the rate of charges for the transportation of freight on the road of appellee, from Fort Smith, in the State of Arkansas, to Grannis, in said State, as well as to and from other stations on the line of said railway. The Fort Smith Chair Company delivered to appellee at its station at Fort Smith, Arkansas, a lot of chairs to be shipped over its line of railway to Grannis, Arkansas, and received from said railway a bill of lading for same. The transportation was continuous and at no time in the course of transit passed over the line of any other railway or out of the possession of appellee; it was one continuous shipment over the same line of railway. The point of origin and destination were both in the State of Arkansas, and the consignor and consignee were both citizens of the State of Arkansas. From Fort Smith, the point of origin, it passed one mile in the State of Arkansas, to the Indian Territory line, thence over the line of appellee's road through the Indian Territory 63.841 miles to the Arkansas State line, thence in the State of Arkansas 51.155 miles over the appellee's road to Grannis, the point of destination, in Arkansas. Appellee demanded and received from said Chair Company for said shipment an amount which exceeded the rate fixed by said Railroad Commission for the shipment of freight from Fort Smith, Arkansas, to Grannis, Arkansas, of $1.81. Thereupon the Chair Company filed with the Railroad Commission a complaint, setting up the over-charge made by ap-

pellee and asked that it be cited to appear before said Commission and show cause why it should not conform its rates of charges for shipments of the character named to the schedule of rates fixed by said Commission. Appellee appeared in response to said citation and interposed a plea to the jurisdiction of the Commission, alleging that the shipment constituted interstate commerce and not State commerce, and therefore, was not subject to the schedule of rates fixed by the Railroad Commission of Arkansas. Upon the hearing, the appellee's plea to the jurisdiction was overruled, the Commission holding that the shipment constituted State and not interstate commerce. (Record, pp. 24, 25, 26 and 27.) Thereupon the appellee filed a bill in the Circuit Court of the United States for the Western Division of the Eastern District of Arkansas, against the Board of Railroad Commissioners of the State of Arkansas. (Record, pp. 1 to 15.)

The allegations in the bill are, that the complainant (who is the appellee here), is a railroad corporation existing under the laws of the State of Missouri, owning a line of railroad and operating it as a common carrier of passengers and freight from Kansas City in the State of Missouri, to Ogden on the line dividing the States of Arkansas and Texas; that said railroad traverses parts of the following states and territories, to-wit: Missouri, Kansas, Arkansas and Indian Territory; that after leaving the State of Missouri it runs through the State of Arkansas for 28.649 miles, thence through the Indian Territory for a distance of 127.781 miles, then again in the State of Arkansas, which it traverses for a distance of 117.618 miles; that

it also has a branch line from Spiro, in the Indian Territory, to Fort Smith, in the State of Arkansas, fifteen miles of which is in the Indian Territory and one mile in the State of Arkansas; that it also owns other branches running from points in the State of Texas and Indian Territory for short distances to points in the State of Arkansas, and along which lines there are numerous stations from which freight is shipped; that whenever any freight is shipped from these stations to Fort Smith, or from Fort Smith to them, such shipments must, of necessity, pass over complainant's, appellee's, line of railroad extending through the Indian Territory, and to points in Miller County, Arkansas; that the defendants, appellants, who compose the Railroad Commission of the State of Arkansas, claim and assert under the authority of that State, the right to regulate the charges for carrying freight by the complainant, appellee, from and to places in the State of Arkansas, where the course of transportation is mostly through and over the Indian Territory, or the State of Texas, and threaten upon refusal of complainant, appellee, to comply with their schedule of charges, to visit it with the penalties prescribed by the laws of the State of Arkansas for violation of the orders of the Railroad Commission; that in pursuance of their alleged authority they have cited complainant, appellee, to appear before them and answer the complaint of the citizens of the State of Arkansas, by reason of the fact that complainant, appellee, charges for the transportation of freight from Fort Smith, Arkansas, to Grannis, in the same State, passing in the course of transportation through the Indian Territory for the largest portion of the trip, a rate in excess

of that prescribed by the Commission, although the shipment complained of was continuous from Fort Smith to Grannis, on a through bill of lading and moved in the State of Arkansas, etc., as already stated, one mile to the State line, thence, 63.841 miles in the Indian Territory to the Arkansas State line, thence in Arkansas 51.155 miles to the point of destination.

The bill further charges that complainant, appellee, does a large carrying business between the stations in the State of Arkansas, but which it must carry principally on the line of road in the State of Texas and the Indian Territory and if the defendants, appellants, are not restrained by injunction a large number of suits will be instituted against complainant, appellee, for the penalties prescribed by the law of the State, to the great detriment and irreparable injury of complainant.

The Circuit Judge issued a temporary injunction at the instance of the appellee upon the filing of its bill. (Record, pp. 28, 29 and 30.) Thereupon appellants filed a demurrer to appellee's original bill, which is as follows, to-wit:

The defendants by protestation, not confessing any or all of the matters and things in the plaintiff's bill of complaint contained to be true, in such manner and form as the same is therein set forth and alleged, doth demur to said bill, and for cause of demurrer sheweth:

That the plaintiff has not in his said bill made or stated such a cause as entitles him, in a court of equity, to an injunction against these defendants, or either of them, or to any relief against these defendants, or either of them.

Wherefore and for divers other good causes of demurrer appearing in said bill, the defendants doth demur thereto, and humbly demanded the judgment of this court whether they shall be compelled to make any further answer to the said bill, and

prays to be hence dismissed with their costs and charges in this behalf most wrongfully sustained. (Record, p. 32.)

Upon the hearing, the court overruled the demurrer. (Record, p. 33 to 44) Appellants declined to plead further, but rested on their demurrer and filed the following assignments of error.

ASSIGNMENT OF ERRORS

1. The court erred in overruling defendant's demurrer to the bill herein.

2. The court erred in rendering a decree against defendants in this cause. (Record, p. 46.)

And prayed an appeal to the Supreme Court, which was granted. (Record, p. 47.)

BRIEF

The authority conferred upon the commission will be found in the Acts of Arkansas of 1899, at page 82, and more particularly in Sec. 9 of said acts at page 86, which is as follows:

Section 9. That every person or corporation operating any railroad or express business in this State is hereby required to furnish said commission, within fifteen days after notice to do so, with the rate sheet and tariff charges for transportation of every kind over such railroad, it shall be the duty of said commission to examine and revise said rate sheet and tariff charges for freight or express matter for each railroad in this State, and determine whether or not, and in what manner, if any, such charges and rates are more than just and reasonable compensation for the services rendered, and whether or not and in what manner, if any, said charges and rates are in violation of any of the provisions of this act; and said commission will make reasonable and just rates of freight, express and passenger tariffs to be observed by all persons and corporations operating any

railroad or engaged in transporting persons or property as express or freight in this State; shall make rules and regulations as to charges at any and all points for the necessary hauling and delivering of express and freight; regulate rates and charges for such service on all railroads as, in their judgment, justice to the public and said person or corporation may require; and so make the same conform to the requirements of this act. And said commission, in making such rules and regulations, shall first give the person or corporation to be effected thereby notice to appear and show cause, if any it can, why no change should be made in the rates then in force, and shall take into consideration the character and nature of the service to be performed, the entire earnings of any railroad or express company, the expense of operating the same, and the income and value thereof. And when any tariff of charges is corrected and approved, said commission shall append a certificate of its approval to said tariff of charges and give notice thereof to any officer or agent of the railroad or express company to be effected thereby, and said tariff and charges shall be kept posted up for at least five days before the same shall go into effect. And said commission shall accordingly fix rates and tariffs of charges for those express companies and railroads, the officers of which fail to furnish rate sheets or tariffs of charges as above required. Said commission shall not alter or change any tariff or charges so approved by it except upon ten days' notice in writing to the person or corporation operating the express company or railroad to be effected by such change, giving the same an opportunity to be heard; such notice to be by delivering a copy thereof to any officer or agent of such person or corporation.

The question raised by the demurrer, in short, is, whether a shipment in bulk, for one continuous passage over a single line of railroad upon a single bill of lading from a point in Arkansas to another point in Arkansas, but passing out of the State into the Indian Territory and thence back into the State

in course of transportation, both consignor and consignee being residents and citizens of the State of Arkansas, constitutes domestic, or inter-state, commerce.

The Constitution of the United States, Article 1, Section 8, provides: "The congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

It has been held that the power of congress to regulate commerce extends to every species of commercial intercourse between the United States and foreign nations and among the several States and Indian tribes."

In the earlier adjudications commerce seemed to be limited to the buying and selling of commodities, but since the decision in the case of *Gibbons v. Ogden*, *9 Wheaton 1*, *22 Law Ed.*, *23*, a broader and more comprehensive meaning has been given the term. In construing the commerce clause of the constitution Mr. Chief Justice Marshall says, speaking for the court: "It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. * * * The subject to which the power is next applied is to commerce among the several States. The word 'among' means intermingled with, a thing which is, among others, is intermingled with them."

In the same opinion the Chief Justice says: "It is not intended to say that these words comprehend the commerce which is completely internal, which is carried on between man and man in a State, or between different points of the same State, and which does not extend to or affect other States. * * *

* * * Comprehensive as the word 'among' is, it may very properly be restricted to *that commerce which concerns more states than one*. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose, and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made had the intention been to extend the power to every description. The enumeration presupposes something not enumerated, and that something, if we regard the language of the subject of the sentence, must be the exclusive internal commerce of a State. The genius and character of the government seems to be that its action is to be applied to all external concerns of the nation, and those internal concerns which affect the states generally and not to those which are completely within a particular State which do *not affect other states*, and with which it is not necessary to interfere for the purpose of extending some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself."

Gibbon v. Ogden, 22 Law Ed., U. S. Repts., 69.
Western Union Tel. Co. v. Texas, 105 U. S., 460; 26 Law Ed., 1067.

Before passing to the proposition as to whether the shipment in question is State or interstate commerce, we wish to call the Court's attention to the fact that not only transportation by rail and water have been held to be commerce, but

since the broader interpretation given the term in *Gibbon v. Ogden*, all the agencies used in commercial intercourse have been held to be included in the term commerce.

In *Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S., 1; 24 Law Ed., 708*, the court held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of congress under the commercial clause of the Constitution just as railroad companies or navigation companies.

Ratterman v. Western Union Tel. Co., 127 U. S., 411; 27 Law Ed., 229.
Western Union Tel. Co. v. Texas, 105 U. S., 460; 26 Law Ed., 1067.

These were cases wherein the power of the State to tax telegraph messages was brought into question and the court held in these and many similar cases that the telegraph was an instrument of commerce and that the different states had control over this character of commerce, where it did not affect other states.

In a long list of cases, too numerous to particularize, the Supreme Court of the United States has held that commerce carried on by boat, whether navigating the high seas or upon the navigable rivers of the United States, is under control of Federal and not State authority, and that too, even though the transportation is between points in the same State. One of the leading cases on this subject is that of *Lord v. Steamship Co., 102*

U. S., 541. This case states the proposition most favorable to the appellee, and is a case of transportation from a point in California to another point in the same State. We will designate these cases as navigation cases, for they are the exception to the rule laid down in both the adjudicated cases and the text books, that commerce between points in the same State, though incidentally passing through the territory of another state is domestic as distinguished from interstate or foreign commerce. The reason for the distinction is clearly stated in the opinion of the court delivered by Mr. Chief Justice Waite in *Lord v. Steamship Co., supra*, as follows: "The Pacific Ocean belongs to no one nation, but is the property of all mankind. When, therefore, the Venture went out from San Diego or San Francisco on her several voyages she entered on a navigation which was necessarily connected with other nations. While on the ocean her national character was recognized and she was subject to such laws as the commercial nations of the world had by usage or otherwise agreed on for the government of vehicles of commerce occupying the same common property of mankind. She was navigating among vessels of other nations and was treated by them as belonging to the country whose flag she carried. True, she was not trading with them, but she was navigating with them, and consequently was engaged with them in commerce. If, in her navigation, she inflicted a wrong on another country, the United States, and not the State of California, must answer for what was done; in every just sense, therefore, she was, while on the ocean, engaged in commerce with foreign nations and as such she and the business in which

she was engaged was subject to the regulating power of Congress."

Hence, it will be seen that the conclusions reached by the court were upon grounds entirely different from those applicable to the case at bar. In the Lord Steamship case the rights and liabilities of other nations were brought into question. They were not rights personal to California or her citizens. The navigation had to do and dealt with external concerns, and brought other interests into consideration. In cases of this kind it was said by Chief Justice Fuller, in *Lehigh Valley Railroad Co. v. Commonwealth of Penn., 145 U. S., 192; 36 L. Ed., 673*: "It was unnecessary to invoke the power to regulate commerce in order to find authority for the law in question." In referring to the amendment to the maritime law and the power of congress to regulate maratime matters, in *Ex-parte Boyer, 109 U. S., 629, 27 Law Ed., 1056*, it was held that: "Admiralty jurisdiction extended to a steam canal boat in case of collision between her and another canal boat while the two boats were navigating the Illinois and Lake Michigan Canal, although the libellant's boat was bound from one place in Illinois to another place in the same State;" but, as already stated, the principle is not the same in these cases, or in this class of cases, as the one we have under consideration. The United States controls and retains jurisdiction over its navigable rivers, as well as the ocean and lakes upon its borders, for obvious reasons, and no analogy can be drawn between commerce carried on them, whether from point to point in the same State or between States and nations, and that of a common carrier of freight or passengers

by railroad, or of telegraph companies engaged in commerce. We have found two cases. There may be others which sustain the plaintiff in its contention that a shipment of freight from a point within a State to another point within the same State, is interstate and not State commerce and they are the cases found in *40 Min., 267*, and *The Milk Producers' Ass'n case in 7 Interstate Commerce Reports, 92*. The former was decided prior to the decision of the Supreme Court of the United States in *Lehigh Valley Railroad Company v. Commonwealth of Pennsylvania, 145 U. S., 192*, and the latter since said decision. The Interstate Commerce Commission in the latter case undertaking to distinguish the case before them from that of the Lehigh Valley case, their reasoning may be clear to the conrt, but they fail to advance an argument for their decision which, in our judgment, is not directly opposed to the views of the Supreme Court in the Lehigh Valley case and we had supposed that the Interstate Commerce Commission was controlled by the Supreme Court and not the Court by the commission.

We have undertaken to show the Court that the navigation cases are not in point, and also to show that the cases decided prior to the Lehigh Valley case, *supra*, have been overruled by the judgment of the court in that case, and we now submit to the court that the decisions since the Lehigh Valley case holding to plaintiff's contention have been by subordinate courts and not by the Supreme Court of the United States, and not, therefore, an argument to this court, much less controlling upon it.

But permit us now to call the Court's attention to the adjudicated cases holding with the Arkansas Commission in their views that the case before us is State and not interstate commerce. The leading case on the question is the Lehigh Valley case cited above and the question involved in that case was whether the State of Pennsylvania could levy a tax upon the gross earnings of a railroad for freight carrid from Mauch Chunk, Penn , to Phillipsburg and Trenton, N. J., and thence back into the State of Pennsylvania, by one continuous carriage, though over the line of another railroad. Mr. Chief Justice Fuller in speaking for the court says: "There was no breaking of bulk or transfer of passengers in New Jersey. The point of arrival and the point of departure were alike in Pennsylvania. The intercourse was between these points and not between any other points. Is such intercourse, consisting of continuous transportation between two points in the same State, made interstate because in its accomplishment some portion of another State may be traversed? Is the transmission of freight or messages between two places in the same State made interstate business by the deviation of the railroad or telegraph line into the soil of another State?

"If it has happened that through engineering difficulties, as the interposition of a mountain or river, the line is deflected so as to cross the boundaries and run for the time being in another state than that of its principal location, does such a detour itself impress an external character on internal intercourse?"

Further on in the same opinion, the Chief Justice said: 'It should be remembered that the question does not

arise as to the power of any other State than the State of the *termini*. * * It is simply whether in the carriage of freight and passengers between two points in one State, the mere passage over the soil of another state renders the business foreign which is domestic. *We do not think such view can reasonably be entertained* and are of the opinion that this taxation is not open to constitutional objections by reason of the particular way in which Philadelphia was reached from Manch Chunk."

The holding in this case has never been modified, so far as we are aware, by any decisions of the Supreme Court of the United States, and the State courts have uniformly, since the opinion was delivered, followed it, with the single exception of the *Milk Producers' case in 7 Interstate Commerce Reports, supra* However the counsel for plaintiff may differentiate the Lehigh Valley case they can not get away from the proposition that the Supreme Court in that case said, by an undivided court, that the carriage of freight between two points in the same State with incidental passage over another State does not make the business interstate commerce, nor does it deprive the State of power and contol over it. It is not material whether the question was decided in a case of taxation or a case of regulation of freight charges, for before a conclusion could be reached by the court, the question must be determined whether it was state or interstate commerce, and upon identically the same state of facts as those upon which this suit is based, the court held it to be domestic and not foreign or interstate commerce.

The Supreme Court of New York has held to the same opinion in the case decided as late as January, 1897.

Dollon v. Erie Railroad Co., N. Y. Miscellaneous Reports, Vol. 19, p. 116.

Interstate Commerce Reports, Vol. 7, Add. XXXVII., wherein the court says: "Transportation from one point to another in the same state, with incidental passage through the territory of an adjoining state, is not interstate commerce subject to the regulation of Congress." The Supreme Court of Iowa has held the same doctrine in *Campbell v. Chicago, St. Paul, etc., R. R. Co., 86 Iowa, 587; 17 L. R. A., 443.* This was an action brought by the Railroad Commission of Iowa v. the Chicago & C. R. R. Co. to collect for an overcharge made on a shipment of cattle from Beloit, Iowa, to Sioux City, Iowa. The railway of defendant railroad company from Beloit to Sioux City, Iowa, was 67 miles long, but in passing between the two points nearly half of the distance was over its track in the State of South Dakota. Robinson, C. J., delivering the opinion of the court said, in referring to the Lehigh Valley case, *supra*, "It was held that such transportation was not interstate commerce * * * * Since the question under consideration is a Federal one, the decision last cited is decisive of it. Following that decision, we hold that continuous transportation of articles of commerce from Beloit to Sioux City over the line of railway described is *not* interstate commerce."

The Supreme Court of North Carolina hold the same view.

State vs. Western Union Tel. Co., 113 N. C. 213; 22 L. R. A., 570.
Leavell v. Western Union Tel. Co., 116 N. C. 211, (27 L. R. A., 843.)

We have already called the Court's attention to the fact that the telegraph is as much an instrument of commerce as a railroad and that telegraph messages constitute commerce just as much as freight or passengers on railroads. The facts in the case decided in 113 N. C. were as follows: The Western Union Telegraph Company had a line running from Elizabeth City, North Carolina via Berkley and Norfolk, Virginia, to other points in North Carolina, the railroad commission in North Carolina fixed the rates of charges for messages between points in the State notwithstanding the fact that messages went into the State of Virginia and back into North Carolina in course of transit, the Telegraph Company fixed a rate in excess of the rate fixed by the commission, claiming it to be inter-state commerce not under the control of the commission, and the suit was brought to enforce the commission's rate of charge. The Court said:

"It appears from the findings of fact that the shortest and only route over the wire of defendant by which messages can be transmitted to many points in this State, necessarily traverse in part the State of Virginia and thence back into North Carolina, and it is insisted that such messages so trans-

mitted are interstate commerce, and, therefore, not subject to the tariff regulations of the commission * * * it is plain that such business does not relate to the intercourse of citizens of this State, with those of some other State; it is purely an intercourse between the citizens of North Carolina through the means afforded by a corporation having extensive faculties of communication within the limits of said State, and the uniform rates fixed by the commission for the business which the said corporation accepts, or is under legal obligation to accept, in no wise affect or interfere with any business which the defendant undertakes for any citizen of Virginia, either between themselves or with the citizens of other States. Neither are we able to see how the mere fixing of rates between different points in this State can in any way conflict with any regulation which the State of Virginia may have the power to impose in respect to its domestic business. It must be manifest, therefore, that this business is without a single feature of interstate commerce, etc., * * *''

The same question has been before the Supreme Court of Missouri in

Scammon vs. K. C. & C. R. R. Co., 41 Mo. App. 194.

Seawell vs. K. C. & C. R. R. Co., 119 Mo. 224, 24 S. W. Repts., 1002.

The case decided in 119 Mo., 224, is in every respect similar to the case we have under consideration. The facts in this case were that the K. C., F. S. & M. R. R. Co's. road ran

from Carbon Center, Liberal and Minden to Kansas City points in the State of Missouri, but the greater portion of the road lay in the State of Kansas, the distance from Carbon Center to Kansas City is about 24 miles less than the distance from Liberal, but notwithstanding this fact, and in violation of the rates for freight fixed between these points by the Railroad Commission of Missouri, the railroad company were charging $2.00 more for the short haul than for the long, claiming that notwithstanding the fact that the point of origin and destinaton were both in the State of Missouri, it was interstate commerce, and not subject to the rate fixed by the commission. In this case the Court said, "Here the State of Missouri has undertaken to regulate transportation by rail between points in the State only, and the Supreme Court of the United States has never held that this was interstate commerce, even where such continuous transportation was partly through the limits of another State, but to the contrary." And in speaking of the ruling of the Court in the Lehigh Valley case the Court said, "It would seem that this ruling is directly in point in the present case, when it is remembered that the question here is not as to the power of any other State than the State of the termini, nor as to the regulation of the operation of the defendant or any other companies' road elsewhere than in Missouri."

In the case of the *United States ex rel Kellog et al v. Lehigh Valley R. Co*, decided by the United States District Court, Western District of New York, *115 Fed. Rep., 373*, as late as April, 1902, the court held that a shipment of grain over a single railroad between two points within the same State was not

an interstate shipment although the line of railroad between the terminal points passes through other states.

The Court will find a very able discussion in Elliott on Railroads, Sec. 690, wherein the author says:

"The power to regulate domestic or intra-state commerce resides in the States. The States may make such regulations as they deem expedient or politic for the government of commerce within their own borders; provided, that the regulations do not violate the Constitutional provision. If the place from which the passengers or property are transported and place to which they are carried are both within the territorial limits of the same State, and the carriage is continuous, then the transportation is not interstate commerce, although in course of carriage the passengers or property may on line of transportation pass through the borders of that State. To the rule that when both the passengers or property are received and the places of destination are within the territorial limits of the same State is interstate commerce and subject to State regulations, there is an exception, and that exception is this: If the *carriage* is over the *high seas*, although from place to place in the same State, it is interstate commerce and cannot be regulated by the State."

And again, at Section 1671, says this same author:

"Any commerce which crosses a State line and concerns more States than one is interstate commerce, but unless more than one State is concerned or the transit is in part over high seas, the commerce is not interstate, although a State line is crossed, for commerce which entirely originates and wholly

ends in one State is domestic commerce, notwithstanding the fact that in the transit, a State line is crossed. If, however, the transit is from one State to another, the commerce is interstate, and commerce is not domestic commerce when it is over the high seas."

Counsel for the Railroad Company argue, that if the Indian Territory authorized a certain amount to be charged for the transportation of freight within its borders, and the Arkansas Railroad Commission should fix a different amount between points in Arkansas, but passing in course of transportation over a part of the Indian Territory; that if the rate fixed by the Arkansas Commission should govern, it would be taking from the Indian Territory the right to govern its own internal affairs as guaranteed under the Constitution.

We answer in reply to this argument that the authorities have held without exception that a shipment of freight from Texas, for example, through the Indian Territory and on into Missouri, is not under the control of the Indian Territory, nor will the Indian Territory rate govern in a shipment of this kind, and for what reason? Because it is interstate commerce and the power to regulate such commerce is reserved under the Constitution in Congress.

Now, on the other hand, a shipment from Fort Smith, Arkansas, to Grannis, Arkansas, but passing through the Indian Territory has been held by the Supreme Court of the United States in passing upon a similar proposition in the Lehigh Valley case, to be the domestic commerce of Arkansas,

and therefore not subject to the regulating power of the Indian Territory.

The point we make is, that the Indian Territory has no control over interstate commerce or the domestic commerce of another State, and whether the shipment in controversy is interstate or the domestic commerce of Arkansas, no rates of freight or regulations of the Indian Territory could apply to it, for Congress would control in the one instance and the State of Arkansas in the other, and the illustration of counsel for the railroad company of the rates of freight allowed to be charged by the Indian Territory for shipments therein could not apply to a shipment of this character, for it is not claimed that this is the domestic commerce of the Indian Territory.

In other words, the only way that the proposition of counsel could be applicable would be for this character of shipment to be the domestic commerce of the Indian Territory, and on this point there is no contention.

As we have already undertaken to show the court both the adjudicated cases and the text books hold that a shipment of the character of the one under consideration is the domestic commerce of Arkansas; if it is, the rates fixed by the Indian Territory could no more affect it than they could affect interstate commerce, for the power of each within its constitutional limits is supreme.

If, in determing this question, the Court finds that no other State is concerned in a shipment like the one involved in the ruling of the Railroad Commission of Arkansas, except the

State of Arkansas, then the demurrer to plaintiff's bill must be sustained, for the shipment would then be State and not interstate commerce.

In *Coe v. Errol, 116 U. S., 517; 29 Law Ed., 715.* "Logs cut in Maine and detained at Errol, New Hampshire, on the way down the Androscoggin River to Lewiston, Maine, were held by the Supreme Court of New Hampshire not taxable at Errol.

Thus fixing the principle that mere passage over the soil of another State than that of the origin and termini of the shipment, gives the State over whose soil the transportation is had no jurisdiction or control over such commerce.

For the reason stated we think the demurrer should be sustained.

Respectfully submitted,

WINCHESTER & MARTIN,

Attorneys for Defendants

C. E. WARNER,
of Counsel.